BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

VIRGINIA L. BAHNMAIER	)	
Claimant	)	
	)	
VS.	)	
	)	
HOLIDAY RESORT, INC.	)	
Respondent	)	Docket Nos. 1,004,253;
AND	)	1,009,035
	)	
DIAMOND INSURANCE GROUP	)	
c/o CAMBRIDGE INTEGRATED SVS.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the preliminary hearing Oder for Medical Treatment dated September 9, 2004, entered by Administrative Law Judge (ALJ) Brad E. Avery.

ISSUES

Judge Avery ordered respondent to provide claimant with medical treatment with Dr. Michael Montgomery. Specifically, Judge Avery found that "[c]laimant's need for medical care stemmed from her work-related accidents of 6/4/01 and 8/5/01. She has reported no additional work accidents."[1]

Respondent contends it should not be liable for claimant's ongoing medical treatment because claimant suffered an intervening accident and injury with her subsequent employer. Accordingly, the issue for the Appeal Board's review is whether

[1] Order for Medical Treatment (Sept. 9, 2004).

claimant's present need for medical treatment is the result of accidental injury or injuries that arose out of and in the course of her employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Appeals Board finds that the ALJ's preliminary hearing order should be affirmed.

This appeal involves two docketed claims that were consolidated for hearing and award purposes. In Docket No. 1,004,253, claimant alleged "[a] series [of accidents] beginning August 6 or 7, 2001, and continuing each day worked thereafter."[2] As a result of that series of accidents, claimant alleged she sustained injuries to her "neck, right shoulder, right arm, right hand; since injury to right side and neck she has been overusing her left upper extremity and this has started to hurt, and all other affected body parts."[3] An amended Application for Hearing was filed in Docket No. 1,004,253 on February 13, 2003, wherein claimant alleged a date of accident of June 4, 2001, which occurred while she was "throwing bags of laundry."[4]

In Docket No. 1,009,035, claimant alleged an accident date of "August 6 or 7, 2001" which occurred while claimant was "[l]ifting and turning a resident on his side."[5] Claimant alleged she again injured her "[n]eck, right shoulder, right arm, right hand and all other affected body parts."[6]

At the outset of the September 3, 2004 preliminary hearing Judge Avery announced:

> Judge Avery: Okay. Counsel, we had discussions off the record. The claimant is seeking medical treatment with Dr. Montgomery for her shoulder. This is an accident date of 6/4/01 and 8/5/01. Respondent admits that claimant met with personal injury by accident on the date or dates alleged. Respondent admits the accidental injury arose out of and occurred in the course of employment. Respondent admits timely notice, the relationship of employer/employee, coverage by the [A]ct and timely written claimant [sic], however, it's the respondent's position that the need for medical treatment, if any, did not arise out of the particular

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[2] K-WC E-1 Application for Hearing (filed June 3, 2002).

[3] *Id.*

[4] K-WC-E-1 Amended Application for Hearing (filed Feb. 13, 2003).

[5] K-WC E-1 Application for Hearing (filed Feb.13, 2003).

[6] *Id.*

> accident or accidents that were admitted. Okay. With that, claimant may call her first witness.[7]

Claimant was the only witness to testify at the preliminary hearing. She is 51 years old. She started working for respondent in January of 2001 as a licensed practical nurse (LPN) on the night shift. Claimant denies having any problems with her right shoulder or neck before going to work for respondent. She described two incidents that occurred at work which caused injury to her right shoulder. The first occurred while she was lifting bags of laundry. The second occurred while she was using her right arm to pull a resident up in bed. Respondent admits both accidents occurred at work and that claimant's injuries arose out of and in the course of her employment. Claimant neither missed work nor sought medical treatment immediately after either accident. Her last day worked for respondent was on or about September 24, 2001. About a month later claimant went to work at Vintage Manor, another nursing home, again as an LPN doing essentially the same type of job.

Claimant first sought medical treatment with her family physician, Dr. Stonehocker, who recommended over-the-counter medication like Ibuprofen. Claimant's symptoms persisted and eventually Dr. Stonehocker sent claimant for an MRI on April 5, 2002, which showed a torn rotator cuff.

Claimant saw orthopedic surgeon, Michael L. Montgomery, M.D., on February 6, 2003. Claimant was originally to see Dr. Montgomery on May 30, 2002 but missed that appointment and rescheduled several times. Dr. Montgomery diagnosed a chronic right rotator cuff tear for which he recommended surgical repair. He also recommended claimant be evaluated by a neurologist for the symptoms of numbness in her arm, hand and fingers. Claimant told Dr. Montgomery on February 6, 2003, that she had been experiencing pain in her right shoulder "since March or April of last year " and that "she thinks she injured it throwing 80 lbs. [sic] laundry bags over her shoulder."[8] The Board notes that this history does not correspond with either the specific accident dates alleged or the period claimant was employed by respondent. Nevertheless, claimant reported her injury and completed an incident report for respondent before March of 2002, which evidence an earlier onset of symptoms. Furthermore, the description claimant gave to Dr. Montgomery of how she injured her shoulder corresponds with the June 4, 2001 incident.

At the preliminary hearing claimant denied suffering any new injuries to her right shoulder or neck since August of 2001. Claimant was not asked about the inconsistency in the history in Dr. Montgomery's office notes which reported an onset of symptoms in March or April of 2002. And, neither party mentioned this apparent discrepancy in their

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[7] P.H. Trans. at 4 and 5.

[8] *Id.* at Cl. Ex. 1.

brief to the Board. It may be that claimant mis-spoke or that Dr. Montgomery misunderstood what claimant said, but that is only speculation at this point. Claimant acknowledged her work at Vintage Manor sometimes aggravated her symptoms but insisted those were temporary aggravations and not new accidents or injuries.

> Q. (Mr. Patton) Now, the issue we have here today is since August of, of 2001 have you suffered any new injuries to your right shoulder or neck or any of these?
>
> A. (Ms. Bahnmaier) No.[9]
>
> . . . .
>
> Q. Vintage manor. Okay. I forgot that. In you - - we have a deposition taken and in that on several occasions you said that your con - - actually, you'd gotten worse while working at Vintage Manor; is that correct?
>
> A. Yeah, I - - yes.
>
> Q. Have you gotten worse or explain what you mean by - -
>
> A. Well, I - - it's aggravating. I mean, it's still there and if I bend over, if I put my hair up, stuff like that, you know, I'm right-handed, so it, it's aggravates, it aggravates all the time. It's not really got worse, it's just, it hurts.[10]
>
> . . . .
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> Q. Has your condition changed; are you in more pain now than you were in August of 2001?
>
> A. No, not really.[11]

Based on the record presented to date,[12] the Board finds claimant did not sustain an intervening accident or injury. Although claimant would have flare-ups in her symptoms while working at Vintage Manor, there is no evidence that her symptoms worsened beyond what she experienced at Holiday Resort. Moreover, there is no evidence that her work activities at Vintage Manor permanently worsened her condition.

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[9] *Id.* at 11.

[10] *Id.* at 12.

[11] *Id.*

[12] There was some discussion at the preliminary hearing about a prior deposition of claimant and both parties refer to it in their briefs. However, that deposition is not in the administrative file and neither the preliminary hearing transcript nor the file contains a stipulation to the admission of a deposition.

As provided by the Act, preliminary hearings are not binding but subject to modification upon full hearing on the claim.[13]

WHEREFORE, the Appeals Board affirms the Order for Medical Treatment dated September 9, 2004, entered by Administrative Law Judge Brad E. Avery.

IT IS SO ORDERED.

Dated this _____ day of January 2005.

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BOARD MEMBER

c: Michael G. Patton, Attorney for Claimant
J. Scott Gordon, Attorney for Respondent and Diamond Insurance Group
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[13] K.S.A. 44-534a(a)(2).